No. 89-516

In The

Supreme Court of the United States

October Term, 1989

WILBERT LEE EVANS,

Petitioner,

v.

CHARLES THOMPSON, SUPERINTENDENT,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

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RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

Pursuant to Rule 15.7, respondent is filing this supplemental brief to direct the Court's "attention to new cases . . . not available at the time of the [respondent's] last filing."

SUPPLEMENTAL REASON FOR DENYING THE WRIT

FEDERAL HABEAS RELIEF IS NOT AVAILABLE TO PETITIONER BECAUSE THE *EX POST FACTO* RULE HE PROPOSES WOULD CONSTITUTE A "NEW RULE."

Evans' petition for a writ of certiorari has been pending in this Court since September 27, 1989. In his reply brief filed on November 7, 1989, Evans asked this Court to grant certiorari to resolve an alleged "conflict" between the decision below and *Youngblood v. Lynaugh*, 882 F.2d 956 (5th Cir. 1989). This Court, however, subsequently granted Texas' certiorari petition in *Youngblood*, *see* 110 S.Ct. 560 (1989), and Evans' case has remained in its current "pending" status.

This Court has recently decided two cases which have clarified the "new rule" principle which the Court had announced earlier in *Teague v. Lane*, ___ U.S. ___, 109 S.Ct. 1060 (1989). *See Butler v. McKellar*, ___ U.S. ___, 110 S.Ct. ___ (March 5, 1990); *Saffle v. Parks*, ___ U.S. ___, 110 S.Ct. ___ (March 5, 1990). Under *Teague*, a "new" decision is generally inapplicable in cases on collateral review unless the decision was "dictated" by precedent at the time the prisoner's case became final. *See Teague*, 109 S.Ct. at 1070. In *Butler*, however, this Court stated for the first

time: "The 'new rule' principle . . . validates reasonable, good faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." 110 S.Ct. at ___, slip op. at 6. *See also Parks*, 110 S.Ct. at ___, slip op. at 4.

In Evans' case, there is no question that, at the time his death sentence became final, the Virginia Supreme Court had made a "reasonable, good faith interpretation of existing precedents" and concluded that there had been no *ex post facto* violation. Indeed, in view of *Dobbert v. Florida*, 432 U.S. 282 (1977), and earlier cases such as *Mallett v. North Carolina*, 181 U.S. 589 (1901), it certainly cannot be said that a contrary result was "dictated" by this Court's precedents. *See Parks*, 110 S.Ct. at ___, slip op. at 6 (petitioner proposes "new" rule where existing precedent does not "compel" the rule he seeks).

The reasonableness and the good faith of the Virginia Supreme Court's decision in this case is underscored by the fact that the federal district court judge and the Fourth Circuit reached the same conclusion.* *See Butler*, 110 S.Ct. at ___, slip op. at 7 ("That the outcome . . . was susceptible to debate among reasonable minds is evidenced . . . by the differing positions taken by the judges of the Courts of Appeals for the Fourth and Seventh Circuits. . . ."). *See also Butler* (Brennan, J., dissenting), slip op. at 2 (under *Butler*, "a state prisoner can secure [federal] habeas relief only by showing that the

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* Also reaching the same conclusion under similar facts is the unanimous Tenth Circuit decision in *Coleman v. Saffle*, 869 F.2d 1377, 1385-1387 (10th Cir. 1989).

state court's rejection of the constitutional challenge was *so* clearly invalid under then-prevailing legal standards that the decision could not be defended by any reasonable jurist").

CONCLUSION

The primary reason why certiorari should be denied in this case remains the fact that petitioner's *ex post facto* claim is meritless. Nevertheless, the *ex post facto* rule proposed by Evans, if adopted, would constitute a "new rule" within the meaning of *Butler* and *Parks* because the result he advocates was not dictated by precedent and because the Virginia courts faithfully and reasonably applied the *ex post facto* principles in effect at the time Evans' death sentence became final. Therefore, federal habeas relief is unavailable and this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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March 9, 1990